Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Verizon's Request to Count Investment In NorthPoint Toward Out-of-Region Merger Obligations	)))	CC Docket No. 98-184
	)	

REPLY COMMENTS OF VERIZON

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REPLY COMMENTS OF VERIZON[1]

The Commission's Public Notice sought comment on Verizon's notification that it will count a portion of its $150 million investment in NorthPoint Communications Group, Inc. ("NorthPoint") toward certain merger obligations regarding out-of-region expenditures.[2] Rather than focus on the only relevant issue – whether this investment satisfies the terms of the Merger Conditions – many commenters chose to resort to vitriolic attacks on Verizon, and irrelevant reflections on what the Commission's policy (or Verizon's investment strategy) *should* be. As such, they are "full of sound and fury, signifying nothing." William Shakespeare, *Macbeth*, Act 5, scene 5. Indeed, none of the commenters dispute the relevant facts: Verizon spent $150 million as an investment in an entity that provided advanced services to the mass market outside of Verizon's home region.

Stripped of their invective and specious allegations, the comments actually contain very little in the way of concrete arguments about whether the investment

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1 The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., and are listed in Attachment A.

2 *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control*, 15 FCC Rcd 14032, App. D, (2000) (hereinafter *Merger Conditions*).

satisfies Verizon's merger obligations. And none of those arguments survive when one looks at the actual language of the Merger Conditions. Because Verizon's investment in NorthPoint qualifies as an "Out-of-Region Expenditure" and a "Facilities Expenditure," within the plain meaning of the Merger Conditions, this investment should be credited toward satisfying Verizon's out-of-region expenditure obligations.

I. The NorthPoint Investment Satisfies the Plain Terms of the Merger Conditions, Which Contemplate "Investments in, or Contributions to, Ventures that Provide Competitive Local Service Activity"

The facts regarding Verizon's investment are not in dispute. No one has disputed that Verizon invested $150 million in NorthPoint, and that it was later forced to write off that investment.[3] And no party disputes that NorthPoint itself provided advanced services to the mass market, and thus was a provider of competitive local service, outside Verizon's franchise area. The only real question is whether Verizon's investment in a venture that provided out-of-region competitive local service counts toward Verizon's out-of-region expenditure requirements. Because the Merger Conditions specifically contemplate "investments in, or contributions to, ventures that provide Competitive Local Service activity in Out-of-Region Markets by those ventures," *Merger Conditions*, App. D, ¶ 45, Verizon's investment in NorthPoint satisfies the merger obligations.

[3] Curiously, Covad accused Verizon of having "not mentioned to the Commission" that it wrote off the NorthPoint investment. *See* Covad Comments, at 4. However, the letter Verizon wrote to the Commission – and on which the Commission sought public comment – stated that "Verizon was forced to write off its investment in the company." *See* March 6, 2002 letter from Gordon Evans to Carol Mattey. Covad also tries to insinuate that there is something nefarious about the fact that Verizon wrote off "*more* than the $150 million investment." Covad Comments, at 4 (emphasis in original). The amount over $150 million represents legal fees and other charges related to the NorthPoint deal that Verizon has not counted towards its out-of-region expenditures here.

The Merger Conditions require Verizon to "spend" at least $500 million, and requires that a portion of that investment must be made through facilities expenditures, which are expenditures "used to construct, acquire, lease, use, obtain, or provide facilities, operating support systems, or equipment that are used to serve customers in Out-of-Region Markets." *Id.*, App. D, ¶ 44. In order to qualify, the facilities expenditures must be made in conjunction with "the provision of Competitive Local Service" or other enumerated services, *or* in conjunction with "*investments in, or contributions to, ventures that provide Competitive Local Service activity in Out-of-Region Markets by those ventures*." *Id.*, App. D, ¶ 45 (emphasis added). And the term "Competitive Local Service" is expressly defined to include "provid[ing] Advanced Services to the mass market." *Id.*, App. D, ¶ 43.

By purchasing stock in a venture that provided Advanced Services to the mass market outside Verizon's franchise area, Verizon did "spend" money to "obtain" "facilities, operating support systems, or equipment that are used to serve customers in Out-of-Region Markets," in conjunction with "investments in, or contributions to, ventures that provide Competitive Local Service activity in Out-of-Region Markets by those ventures," *Id.*, App. D, ¶¶ 43-45, and it should receive credit for such an investment.

II. Most of the Commenters' Arguments Attempt to Impose Obligations that Do Not Exist in the Merger Conditions

Because Verizon's investment satisfies the Merger Conditions as written, commenters opposing Verizon's request have attempted to rewrite the plain language, urging the Commission to focus not on the actual out-of-region requirements, but instead on their favored view of what the "intent" or the "policy goals" behind the requirements should be.

For example, some commenters argue that Verizon should not get credit for its investment in NorthPoint because the investment did not "foster out-of-territory competition" or benefit telecommunications consumers. *See* Focal Communications Comments, at 1; Teletruth Comments, at 4-5; Covad Comments, at 2. As an initial matter, it is entirely speculative to argue that Verizon's investment did not foster competition or "yield any benefits" for consumers. *See* Teletruth Comments, at 4. NorthPoint, a provider of competitive local service outside Verizon's franchise area, enjoyed a $150 million cash infusion from Verizon during a time when NorthPoint's business was declining. Although NorthPoint ultimately filed for bankruptcy, NorthPoint nonetheless has had an additional $150 million to operate its company, including providing service which competed with ILECs outside Verizon's franchise area.[4]

More to the point, the Merger Conditions merely required that Verizon "spend" the money on a qualifying investment. The terms of the Merger Conditions do not allow the Commission to look behind the investment and evaluate its impact on consumers. Likewise, the terms of the conditions do not require that the investment be a successful one, however success may be defined. Nor could they; investments in new ventures are inherently risky and some will succeed while others will fail. The Merger Conditions themselves recognize this fact by requiring only that Verizon "spend" the money, and it is the terms of the conditions that control.

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[4] Although NorthPoint has no ongoing business operations, its facilities were purchased by one of the commenting parties (AT&T) and presumably are or will be deployed to provide continued competitive service.

Moreover, a condition that required the Commission to make such an evaluation would convert the Commission into an overseer of the market to subjectively determine what was "good for" consumers. As the Commission has recognized, it is the market and not regulators who perform that function best. "[I]t is hubris to believe that regulators can (better than business) craft the optimal terms and conditions to govern the fundamental rules for market operation, particularly where innovation is at a premium and new and novel technologies are at stake."[5] In addition, any such subjective standard would be impossible to administer. At what point in time and on what basis would the Commission decide whether an investment benefited consumers? Experiments in ADSL technology did not provide the hoped-for competition to cable's video services in the 1990's, but have led to higher speed Internet access services that provide an important competitive check on cable broadband service today. In the Merger Conditions, the Commission wisely avoided that quagmire and adopted an objective standard that merely requires that Verizon make the investment.

More than one commenter focused on the fact that as an *alternative* to spending $500 million, Verizon can satisfy its out-of-region obligations through providing service "over at least 250,000 customer lines that are used to provide competitive local service in out-of-region markets," arguing that this made it "clear" that "customer lines, not mere dollars . . . were the critical focus." ASCENT Comments, at 4. But that provision proves the opposite. The Merger Conditions provide that *either* the money expenditure *or* the customer lines can satisfy the out-of-region conditions. If the Commission wanted to

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[5] Statement of Commissioner Michael K. Powell, *Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., to AOL Time Warner Inc.,* 16 FCC Rcd 6547 (2001).

make customer lines the "critical focus," it could have required that Verizon provide service over a certain number of lines, without the possibility of satisfying the Merger Conditions through dollar expenditures.

AT&T goes beyond the standard policy arguments and attempts to impose an entirely new condition found nowhere in the Merger Conditions or in the Commission's statements. It asserts that the language that allows "investments in, or contributions to, ventures that provide Competitive Local Service" only "contemplates *ventures that provide the service backed by the reputation of Verizon as an investor,*" because such an investment "will induce out-of-region purchases and in-region retaliation." AT&T Comments, at 7 n.21 (emphasis in original). This argument is absurd. Like the other commenters' arguments, AT&T's theory about what the Merger Conditions "contemplate" is not based on anything in the Merger Conditions themselves, but is instead based on potential benefits "anticipate[d]" by the Commission, that were amorphous and outside of Verizon's control. *Id.* at 6. The fact that such benefits may have been "anticipated" by the Commission certainly does not mean they were "required" before the obligation would be deemed satisfied.

III. The Commission Should Not Consider Facts That Are Irrelevant to the Merger Conditions

A. The Fact that Verizon Terminated the Merger, and that NorthPoint Is Now in Bankruptcy, Does Not Affect the Merger Conditions

Some commenters have argued that because the merger with NorthPoint did not close, Verizon should not get credit because it did not "provide" competitive local service outside Bell Atlantic and GTE legacy service areas. However, Verizon invested $150 million in NorthPoint, an entity that indisputably did provide competitive local service in out-of-region markets. The Merger Conditions expressly state that out-of-region facilities investments must be spent in conjunction with *either* providing services, *or* "investments in, or contributions to, ventures that provide Competitive Local Service activity in Out-of-Region Markets by those ventures." *Merger Conditions*, App. D, ¶ 45. There can be no doubt that Verizon's $150 million investment in NorthPoint was an "investment" or "contribution" to a provider of competitive local service.

Of course, as noted above, the Merger Conditions include no requirement that an investment be successful. Nor could they. Such a requirement would be beyond Verizon's control and would be impossible to evaluate at the time of the investment.

Others commenters have claimed that, because Verizon terminated the Merger Agreement, it should not get credit for satisfying the Merger Conditions because Verizon did not "provide" services or "obtain" facilities. At the risk of sounding repetitive, these arguments also fly in the face of the Merger Conditions' plain language. Verizon invested $150 million in NorthPoint, which was an "investment[ ] in" a venture that indisputably continued to "provide" competitive local service in out-of-region markets after Verizon's investment. No more was required in order to satisfy the Merger Conditions.

AT&T argues that, "by payment of a deposit, an acquirer 'obtains' nothing – only when an acquirer makes full payment (immediately or on credit) is anything 'obtained,' and here Verizon made no further payments." AT&T Comments, at 6. This argument applies a convoluted interpretation that is contrary to the plain language of the Merger Conditions (which expressly contemplate that "investments in" or "contributions to" ventures that provide competitive local service would satisfy the facilities investment requirement). It also does not comport with the facts of the transaction. Verizon obtained stock in NorthPoint in exchange for its $150 million investment. *See* NorthPoint/Verizon Joint Application for Transfer of Control, App. 3, at 2. That stock now is worthless because of NorthPoint's bankruptcy, but that does not mean, at the time the investment was made, that Verizon did not "obtain" a portion of NorthPoint, a company with significant out-of-region assets.[6]

In addition, the fact that Verizon did not continue with additional investment in NorthPoint does not diminish the $150 million investment that it did make. It is irrelevant that NorthPoint and Verizon never went through with the business combination contemplated by the Merger Agreement. Even though the deal did not develop as planned, Verizon gave NorthPoint $150 million, and received NorthPoint stock in return. *See* NorthPoint/Verizon Joint Application for Transfer of Control, App. 3, at 2. At the time of the $150 million investment, NorthPoint was a provider of competitive local service in out-of-region markets within the terms of the Merger Conditions.

B. The Allegations in the NorthPoint Lawsuit Have No Bearing on Whether the Merger Conditions Have Been Satisfied

Some commenters engage in a smear campaign, focusing on the worst allegations of a lawsuit that has nothing whatsoever to do with the Merger Conditions. As an initial matter, the allegations are baseless. It is simply ludicrous to suggest that Verizon would have spent more than $150 million dollars, conducted countless hours of work (in

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6 Similarly, it is a false analogy for one commenter to suggest that the NorthPoint investment should not receive credit because "Verizon would obviously not be credited with monies expended in conjunction with an acquisition the Commission declined to approve, or in conducting due diligence in conjunction with an acquisition it elected not to undertake." ASCENT Comments, at 4 n.9. Neither of those situations contemplate an "investment" in a venture that provides competitive local service, as was the case here.

negotiations, due diligence, and regulatory filings, among other tasks), and trumpeted the planned merger to the Commission, state regulators, and the media, as part of a "scheme" to "eliminate a competitor." *See* AT&T Comments, at 3-4. And it is even more ludicrous to suggest that such a scheme would include giving the supposed competitor $150 million to support its business.

Moreover, the simple fact is that the heart of the NorthPoint lawsuit centers on a breach of contract claim. Verizon exercised the Merger Agreement's termination provisions due to a material adverse effect in NorthPoint's business. Even the allegations of the NorthPoint complaint admit that Verizon terminated the Merger Agreement only after NorthPoint announced that its Third Quarter 2000 revenues would be 20% less than had been reported just a few weeks earlier ($24 million instead of $30 million), and that its EBITDA losses would be 15% higher than previously reported ($90 million rather than $79 million).[7] The outcome of that lawsuit has no bearing on the only issue here: whether Verizon did "spend" money to "provide" services and "obtain" assets through "investments in" a venture that provided competitive local service in out-of-region markets. It did, and it should get credit for that investment.

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[7] *See* First Amended Complaint, ¶ 40, attached as an exhibit to AT&T's Comments. NorthPoint's First Amended Complaint has been superseded by a Second Amended Complaint filed July 20, 2001. However, the Second Amended Complaint merely replaced the plaintiffs' names with that of the NorthPoint entities' bankruptcy trustee, and did not change the substance of the allegations.

Conclusion

For the foregoing reasons, Verizon requests that the Commission find that Verizon's investment in NorthPoint counts toward satisfying its merger obligations regarding out-of-region investment.

Respectfully submitted,

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Attachment A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.